MALAYSIA GOVERNMENT OFFICERS' CO-OPERATIVE HOUSING SOCIETY LTD. v. UNITED ASIA INVESTMENT LTD. & ORS.

[O.C.J. (Abdul Hamid J.) August 21, 1971]

[Kuala Lumpur — Civil Suit No. 1278 of 1970]

Practice and Procedure — Stay of proceedings — Application for — Time for filing and delivering statement of defence — Extension of.

Practice and Procedure — Accounts — Principal and agent.

Arbitration — Agreement between principal and agent — Action for accounts — Bona fide question of fraud raised — Arbitration Ordinance, 1950, s. 5.

This was an application, under section 5 of the Arbitration Ordinance, by the first defendant company, for an order that all further proceedings in this action be stayed, alternatively, for an order that the time for filing and delivering the statement of defence and any counterclaim be extended a month from the date of the order.

The plaintiff was claiming for an account of the balance of monies paid by the plaintiff to the first defendant, pursuant to an agreement entered into on July 26, 1963, whereby the plaintiff appointed the first defendant its agent for development of lands for a housing project. The plaintiff paid to the first defendant various sums of money totalling in the aggregate $24,144,929.30. It was claimed that there was a balance of $7,096,676.02, being monies belonging to the plaintiff and held by the first defendant on trust for the plaintiff. The plaintiff contended that the first defendant had committed wilful breaches of trust resulting in stoppage of work on the project.

Appearance was entered by the first defendant on March 23, 1971. However, no defence was filed. Instead, on April 6, 1971, the last day on which defence had to be filed, the first defendant filed this application.

It was averred by the first defendant that it was expressly agreed between the parties that "on termination of the agreement under paragraph (a) of clause 17, any accounting between the parties shall, in the absence of agreement, be referred to arbitration...." It was further averred that the plaintiff's substantial claim was for an accounting between the plaintiff and the first defendant, and in view of clause 21 of the agreement, all matters in dispute in this action were within the scope of the agreement and were fit and proper matters to be referred to arbitration.

Held: (1) the court is invested with the power to stay the proceedings if it is satisfied that there is sufficient reason that the matter should be referred to arbitration, provided the applicant was, at the time when the proceedings were commenced, and still remained ready and willing to do all things necessary to the proper conduct of the arbitration;

(2) having regard to the circumstances of this particular case, and in the light of the pleadings and the affidavits, the court was satisfied that one of the substantial matters at issue was the question of the perpetration of fraud on the part of the first defendant, a matter which was outside the arbitrator's power to decide. Therefore, good grounds existed as to why this particular dispute should not be submitted to an arbitrator;

(3) an extension of two weeks from the date of the order will be allowed for the first defendant to file their defence. However, as the first defendant had ample time to prepare the defence, which they failed to do, they had to pay the costs of and proceedings incidental to this application in any event.

Cases referred to:-

(1) *Allagappa Chettiar* v. *Palanivelpillai & Ors.* [1967] 1 M.L.J. 208.

(2) *Barnes* v. *Youngs* [1898] 1 Ch. 414 at p. 418.

(3) *Green* v. *Howell* [1910] 1 Ch. 495 at p. 511.

(4) *Bristol Corporation* v. *John Aird & Co.* [1913] A.C. 241.

(5) *Young* v. *Buckett* 46 L.T.R. 266.

(6) *Turnock* v. *Sartoris* [1890] 43 Ch. D. 150.

(7) *Ives & Barker* v. *Williams* [1894] 2 Ch. 478.

(8) *Cook* v. *Catchpole* (1864) 2 L.T.R. 264.

(9) *Printing Machinery Company Limited* v. *Linotype and Machinery Limited* [1912] 1 Ch. 566.

(10) *Minifie* v. *The Railway Passengers Assurance Co.* (1881) 44 L.T.R. 552 at p. 554.

(11) *Wallis & Anor.* v. *Hirsch & Ors.* 140 E.R. 131.

(12) *Scott* v. *Avery* 62 E.R. 653.

(13) *Tauton-Collins* v. *Cromie & Anor.* [1964] 2 All E.R. 332.

CIVIL SUIT.

V. C. George for the applicant/first defendant.

Raja Abdul Aziz for the respondent/plaintiff.

Cur. Adv. Vult.

Abdul Hamid J.: This is an application by the first defendant company for an order that all further proceedings in this action be stayed, alternatively for an order that the time for filing and delivering the statement of defence and any counterclaim be extended a month from the date of the order.

The plaintiff is a co-operative housing society having its office at 9th floor, Mercantile Bank Building, Kuala Lumpur. The first and second defendants are companies incorporated in Malaysia and having their registered offices at "BR" Floor, Fook Chuen Mansion, Jalan Haji Hussein, Kuala Lumpur. The third defendant is a director and shareholder of both the first defendant company and the second defendant company.

Before dealing with the merits of this application it is important to consider briefly the nature of the plaintiff's claim. Under an agreement entered into on 26th July, 1963 the plaintiff appointed the first defendant company as its agent for development of lands for a housing project. The plaintiff paid to the first defendant various sums of money totalling in the aggregate $24,144,929.30. Out of this sum the first defendant company paid out to the architects, consultant engineers, contractors and others employed by the first defendant company on behalf of the plaintiff such sums totalling in the aggregate $15,129,394.69. In addition the first defendant company was entitled to a sum of $1,921,858.59 as remuneration. It is claimed that there is a balance of $7,096,676.02 being monies belonging to the plaintiff held by the first defendant company on trust for the plaintiff.

It is alleged that out of the balance of monies held by the first defendant company, various sums totalling in the aggregate $3,428,690.84 were paid out to the second defendant company and the third defendant. It is the plaintiff's contention that the first defendant company committed wilful breaches of trust.

It is also alleged that consequent upon its committing the breaches of trust, the first defendant company became unable or failed to make payments for the works carried out when such payments became due and as a result work on the project of the plaintiff was stopped and the plaintiff thereby incurred loss and damage.

The plaintiff therefore is claiming for an account of the balance of monies paid by the plaintiff to the first defendant company pursuant to the agreement, monies possessed and received by the defendants or any of them as trustees for the plaintiff; an account of the property now in the possession of the defendants or any of them representing monies possessed and received by them as trustees for the plaintiff; a declaration that the defendants stand possessed of the property now in the possession of the defendants upon trust for the plaintiff absolutely; and, an order that defendants do pay or transfer to the plaintiff all such property now in their possession and all such further monies as shall be found due to the plaintiff on the taking of such accounts.

The first defendant entered appearances on the 23rd March, 1971. No defence was filed. On the 6th April, 1971, that is, the last day on which defence had to be filed, the first defendant's solicitors wrote to the plaintiff's solicitors asking for a further period of two months to deliver the defence. It was also indicated therein that in the event of the refusal of the extension sought, the first defendant asked for sufficient time to apply to the court for extension to file the defence to expire on the 16th day of April, 1971. No defence was filed by the first defendant company. Instead, on the 16th day of April, 1971 the first defendant filed this application for stay of further proceedings or alternatively for extension of one month to file the statement of defence.

The affidavit in support of the application was affirmed by the third defendant in his capacity as director of the first defendant company. Reference was made to clause 17(b) of the agreement. It is averred by the first defendant that it was expressly agreed between the parties that:

"on termination of the agreement under paragraph (a) of clause 17, any accounting between the parties shall, in the absence of agreement, be referred to arbitration and if as a result of the said arbitration damages are considered to be due to either party, such damages shall be assessed by a court of competent jurisdiction."

It is further averred that the plaintiff's substantial claim is for an accounting between the plaintiff and the first defendant and in view of clause 21 of the agreement, all matters in dispute in this action are within the scope of the agreement and are fit and proper matters to be referred to arbitration. It is contended by the first defendant that the plaintiff should be precluded from pursuing the action till after the matter is referred to and decided by arbitration.

In reply to the first defendant's affidavit the secretary and treasurer of the plaintiff's society affirmed that by reason of the first defendant company's having committed breaches of trust and by reason of its joining in complicity with the deponent/third defendant in paying out to the second defendant company and the third defendant monies held on trust for the plaintiff (directly or indirectly for the benefit of the deponent/third defendant), the first defendant company deprived itself of any right it may have had to require reference of any matter to arbitration. In particular it is averred that —

(a) the matter of accounting as between the first defendant company and the plaintiff is now only a small part of this action;

(b) that by reason of the position of the deponent/third defendant as a director in the first defendant company by paying out to the second defendant company and/or to the third defendant monies which it held on trust to the plaintiff was perpetrated fraud or an act in the nature of fraud with intent of benefiting the third defendant and the said fraud was plainly committed at the instigation or connivance of the third defendant;

(c) in addition to the accounts the other question to be decided is whether the monies held by the first defendant company on behalf of the plaintiff were so held on trust (that is, the balance of the total monies less payments and deductions properly made) and also whether such monies or any part thereof paid out by the first defendant company to the second defendant company and the third defendant would render the second defendant company and the third defendant trustees or trustee of so much of the monies received by them or each of them for the plaintiff;

(d) that the provisions of the arbitration clause as contained in clause 17 of the agreement never contemplated the perpetration of such acts as those committed by the first defendant company by virtue of its position as agents of the plaintiff under the agreement;

(e) that the issues which have arisen by reason of the acts of the first defendant company in its dealings with the monies of the plaintiff are not issues which it is proper or convenient to refer to arbitration in accordance with the arbitration clause as any reference to arbitration can only relate to a very small portion of the matter in issue the arbitrator to be appointed not having power to deal with the issues nor the jurisdiction to make an award binding upon all the parties involved;

(f) there is an urgent need for the first defendant company and the third defendant having regard to the latter's complicity in the commission of the wilful breaches of trust to be required to account at the same time as the first defendant company is required to do; and

(g) the issues between the plaintiff and the first defendant company and the issues between the plaintiff and the second defendant company and the third defendant have by virtue of the fraud or wilful breaches of trust committed by the first defendant company become inseparable and to require such issues to be separately adjudicated by separate tribunals would not be just in the circumstances.

This application is made under section 5 of the Arbitration Ordinance, 1950. The court is invested with the power to stay the proceedings if it is satisfied that there is sufficient reason that the matter should be referred to arbitration provided the applicant was, at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration.

It would seem that the first defendant company was and still remains ready and willing to do all things requisite to enable all the matters in dispute to be determined by arbitration. It would also appear that as between the plaintiff and the first defendant company, the matter in dispute may conveniently be dealt with by an arbitrator.

Mr. V. C. George counsel for the applicant submitted that it is within the arbitrator's jurisdiction to make an award. He drew the court's attention to section 16 of the Ordinance which states that any award may, by leave of the court be enforced in the

same manner as a decree, judgment or order to the same effect.

Being satisfied that the applicant brought itself within section 5 of the Arbitration Ordinance, it is for the plaintiff to satisfy me that there were good grounds for the case to proceed. (See *Allagappa Chettiar* v. *Palanivelpillai & Ors.*[1]).

I am conscious that in law the decision lies with the discretion of the court. However, this discretion must be founded upon judicial principles. [See *Barnes* v. *Youngs*[2] (*per* Romer J.); *Green* v. *Howell*[3] (*per* Buckley L.J.)]. It is for the court to consider whether the questions at issue are such as would be better decided by the court than by an arbitrator. In doing so the court will have regard to all the circumstances of the particular case. (See *Bristol Corporation* v. *John Aird & Co.*[4]).

As between the plaintiff and the first defendant, I am inclined to think that the arbitrator has jurisdiction to make an award if accounting and other differences arising directly under the agreement are the only matters in issue. That does not seem to be the case here. The matters in issue in the present case may involve not only a decision as to whether the first defendant company was a trustee of the plaintiff but also a question of fraud. Moreover the plaintiff is also claiming against two other defendants, and the deponent/third defendant, evidently, is not only a director and shareholder of the first defendant company but also of the second defendant company. If, as alleged by the plaintiff, the monies held by the first defendant company were indeed held in trust for the plaintiff and that a fraud or an act in the nature of fraud was perpetrated with intent to benefit the third defendant, then clearly by reason of the third defendant's position in these companies, the questions of accounting, breaches of trust and fraud become quite inseparable. Should the matter be submitted to arbitration in accordance with the provisions of the agreement and an award be made against the first defendant company then clearly such award cannot be binding upon and enforced against the second and third defendants. Thus insofar as the plaintiff's claim against the second and third defendants, the matter will still have to be decided by the court.

Raja Abdul Aziz cited a number of cases to illustrate the principles upon which the courts normally follow in considering applications of this nature, in particular he referred to *Young* v. *Buckett;*[5] *Turnock* v. *Sartoris;*[6] *Ives & Barker* v. *Williams;*[7] *Cook* v. *Catchpole*[8] and *Printing Machinery Company Limited* v. *Linotype and Machinery, Limited.*[9]

The learned counsel also referred to *Minifie* v. *The Railway Passengers Assurance Company*[10] where Pollock B. posed this question —

"What, then, is to be accepted as sufficient reasons why matters in difference cannot or ought not to be referred to arbitration?"

and said —

"In the first place, such reasons may exist apart from the nature of the issue between the parties, such as that the defendants have omitted to apply to the court or a judge within a reasonable time, or by their dealing with the claimant have led him to suppose that they would not object to a trial by jury, and in either of these cases the plaintiff might have incurred expenses in preparing for trial, which would be thrown away if the matter went to arbitration. Other cases again, which are more likely to occur, are those in which the subject-matter of contention or the particular evidence to be adduced by the plaintiff or the defendants may be such as ought to induce the court or a judge to act upon the power conferred by this section."

The learned counsel also cited to me *Wallis & Anor.* v. *Hirsch & Ors.*[11] where Cockburn C.J. refused an application for stay of proceedings where the plaintiff *bona fide* alleged that the question raised was one of fraud (see also *Scott* v. *Avery*[12]).

And in another case *Tauton-Collins* v. *Cromie & Anor.*[13] Lord Denning expressed the view that —

"It is undesirable that there should be two proceedings before two different tribunals (the official referee and an arbitrator) who might *e.g.* reach inconsistent findings."

Having regard to the circumstances of this particular case and in the light of the pleadings and the affidavits before this court, I am satisfied that one of the substantial matters at issue is the question of the perpetration of fraud or something in the nature of fraud on the part of the first defendant company, a matter which it would seem to me to be outside the arbitrator's power to decide. In my view this is not the type of dispute that should be properly referred to an arbitrator. In other words I am satisfied that good grounds exist why this particular dispute should not be submitted to an arbitrator. I therefore refuse the application to stay proceedings to refer to arbitration.

The applicant alternatively asked for extension of time for defence to be filed. This is objected to by the plaintiff on the ground that it is an attempt on the part of the first defendant company to delay the proceedings and an abuse of the process of the court. In the circumstances of this case, it would seem to me that the plaintiff's allegation that the application for extension is made for the purpose of delaying the proceedings is not completely without justification. The applicant could have made the application at the earliest possible moment but this was not done. Neither was there any intimation made to the plaintiff that the first defendant company was applying for the stay of proceedings to refer to arbitration. Nevertheless the court cannot ignore that in the same action the plaintiff is also claiming against the second and third defendants who have already filed their defence. I would therefore allow extension of two weeks from the date of this order for the first defendant company to file their defence. In making this order I have taken into account the fact that several months had lapsed since the date of this application. The first defendant company had ample time to prepare the defence. As regards costs I think the first defendant company should pay the costs of and proceedings incidental to this application in any event.

Order accordingly.

Solicitors: *Ng Ek Teong & Partners; Rithauddeen & Aziz.*